

TAN KIM SWEE

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v.

PEGAWAI PENTADBIR PUSAKA HARTA
PUSAKA NORAZMI AHMAD

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HIGH COURT MALAYA, PULAU PINANG
ZALEHA ZAHARI J
[CIVIL APPEAL NO: 12-94-1999]
2 DECEMBER 2000

CIVIL PROCEDURE: *Pleadings - Defence - Defence not filed within time but filed after plaintiff gave notice to enter judgment in default of pleadings - Whether proper exercise of discretion by trial court to accept defence*

c

CIVIL PROCEDURE: *Pleadings - Defence - Filing of defence - When time runs*

d

CIVIL PROCEDURE: *Pleadings - Defence - Filing of defence before application for extension of time - Whether rendered statement of defence irregular*

The defendant had filed an application to strike out the plaintiff's claim. The defendant's application was dismissed both by the court of first instance and on appeal. No defence had been filed to the claim.

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More than four years after the defendant's appeal was dismissed, when the matter was called up before the trial court, the plaintiff sought judgment in default of pleadings. The defendant subsequently filed a statement of defence without obtaining leave of court. Upon the plaintiff's objection, the defendant then filed an application for extension of time to file the defence.

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The court of first instance allowed the defendant's application and the question that arose on appeal was whether there had been a proper exercise of the lower court's discretion.

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Held:

[1] Where a defendant desires to defend the whole or any part of the claim he must file and cause to be served on the plaintiff his defence before the return day of the summons, unless time has been enlarged by consent or by an order of the court. Failure to comply with the time fixed for defence either by the rule itself or by consent or by order of court places the defendant in default of defence.

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- a* [2] The absence of an express order by the court to file defence does not mean that time does not run. In the present case although there was an agreement to suspend the filing of the defence until the disposal of the defendant's application to strike out, the same terminated upon the conclusion of the defendant's appeal in the High Court. In the circumstances the defendant should have filed a defence within a reasonable time of the decision on the appeal.

- b* [3] It was incumbent upon the defendant to obtain an extension of time before filing the defence and the failure to do so caused the statement of defence filed by the defendant to be irregular.

- c* [4] The material before the court was insufficient to excuse the delay of more than four years after the decision on the appeal to file the defence and the lower court had not exercised its discretion properly in allowing the application and accepting the defence that was filed.

- d* [Appeal allowed with costs; interlocutory judgment entered for plaintiff; damages to be assessed.]

Legislation referred to:

Rules of the High Court 1980, O. 19 r. 3

- e* Subordinate Courts Rules 1980, O. 1 r. 3, O. 3 r. 5, O. 14 r. 5(2)

For the appellant/plaintiff - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co

For the respondent/defendant - Khairuddin Alaudin; M/s Bala Mahesan & Khairudin

- f* Reported by Satish PS Nair

JUDGMENT

Zaleha Zahari J:

- g* This appeal involves a question of the exercise of the discretion of a subordinate court to accept a statement of defence filed after a notice to enter judgment in default of pleading had been given by the plaintiff. The application on the part of the respondent/defendant which was allowed by the Sessions Court Judge was in the following terms:

- h* (a) Bahawa Mahkamah menerima Penyata Pembelaan Defendan yang difailkan pada 8 Februari 1999.
- (b) Sebarang perintah lanjut yang pada pendapat Mahkamah ini perlu dan suaimunafaat.

- i* The question of the time for filing a defence is dealt with in O. 14 r. 5 of the Subordinate Courts Rules 1980 (SCR) which reads as follows:

- (1) A defendant who disputes his liability for the whole or part of any claim in the action may, *a*
- (a) at any time before the return day, serve on the plaintiff a notice of appearance or a defence, as the case may be, for which the notice of appearance appended to the summons may be used; or *b*
- (b) appear on the return day and dispute the Plaintiff's claim.
- (2) Where a defendant appears in Court and disputes the Plaintiff's claim, the Court may order him to serve a defence within such time as it may direct.
- (3) If a defendant fails to comply with the order of Court made under paragraph (2), the Court may make such order as it thinks just including, in particular, an order that judgment be entered for the Plaintiff. *c*

Besides this provision, O. 3 r. 5 SCR, in relation to the court's power to extend time, is also relevant in determining this appeal. It reads as follows: *d*

- (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.
- (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period. *e*
- (3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose. *f*

As to the effect of default in pleadings, in the absence of an express provision in the SCR, pursuant to O. 1 r. 3 SCR, the provision of O. 19 r. 3 of the High Court Rules 1980 is applicable. This rule provides that:

Where the plaintiff's claim against the defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any. *g*

The background facts upon which the Sessions Court Judge was called to exercise her discretion are not in issue and arises in this way: By an amended summons (not redated) and statement of claim redated 15 May 1989 the appellant, through his solicitors, claimed for damages arising from an accident between two motorcycles, ie, PAP 3530 ridden by him, and that of PBJ 7693 ridden by Norazmi bin Ahmad (deceased) on 15 April 1987. The date of *i*

a service of this amended summons and amended statement of claim has not been held out by either party. This amended summons bears a return date of 28 June 1989.

b It is common ground that subsequent to the service of the amended writ and amended statement of claim on the defendant, the defendant did not file a notice of appearance and that on the return date, the defendant did not appear in person but retained counsel to act on his behalf. It is also an admitted fact, and as evident from p. 3 of the Rekod Rayuan Tambahan, that on the return date of 28 June 1989 the defendant had not as of that date filed a defence. That the defendant had instead filed a striking out application dated 11 July 1989 which was eventually heard on 31 January 1990.

c It is also not in issue that on the subsequent mention date of 26 July 1989, trial dates of 30 August 1989, of 28 September 1989, mention date of 25 October 1989, trial date of 9 November 1989, prior to the hearing of the striking out application, the defendant still did not file a defence. There is also nothing on record to show that the defendant's counsel had taken steps to obtain the consent of the plaintiff's solicitors or an order of court for an extension of time pursuant to O. 3 r. 5 of the SCR for filing of their defence; alternatively, to suspend the filing of defence entirely pending the disposal of the striking out application which had been filed by them.

d The defendant's striking out application was dismissed by the Sessions Court on 31 January 1990. The defendant appealed. The court however took note of the fact that on the mention date eight months later on 27 September 1990, the defendant sought for an order for stay, to which application the plaintiff's counsel had no objection (see p. 8 and 9 of Rekod Rayuan Tambahan). Also noted is the Penang High Court decision on the respondent's appeal on 18 February 1994 upholding the Sessions Court decision and the matter then reverted back to the Sessions Court for action.

e There appears to be a time lag of more than four years after the dismissal of the defendant's appeal by the High Court before the case was called again in the Sessions Court. It was called for mention on 15 May 1998, adjourned to 1 June 1998, then fixed for trial on 3 July 1998. It was further adjourned to 1 September 1998, adjourned again for mention on 2 October 1998, then fixed for trial on 12 November 1998, and thereafter adjourned again to 5 February 1999.

f On the date of trial on 5 February 1999 Encik Khairudin appeared for the defendant. He sought an adjournment on the ground that counsel who was handling this matter, Encik Bala Mahesan, was sick. Encik Brijnandan Singh Bhar, counsel for the plaintiff, objected strongly to the adjournment sought. Not only that, Encik Brijnandan also applied for judgment to be entered against

the respondent in default of pleadings. It would appear that, notwithstanding this strong stance taken by the plaintiff's counsel, the Sessions Court Judge was not in agreement with the stand taken by the plaintiff's counsel. The application to enter judgment in default of pleadings was not allowed but she instead allowed Encik Khairudin's application for adjournment. The case was then adjourned to 11 February 1999 for hearing. Three days after this adjournment was allowed the defendant filed a statement of defence (ie, on 8 February 1999) without obtaining the leave of the court.

At the next hearing date of 11 February 1999 the court minutes reads as follows:

Encik Brijnandan bagi pihak plaintiff.
Encik Balamahesan bagi pihak defendan.

Encik Khairuddin: Aturan 14 Kaedah 5(2) dan (3) Kaedah Mahkamah Rendah 1980 – Tiada perintah dari Mahkamah supaya pembelaan difailkan.

Mahkamah; 12/4/99 (bicara permohonan) Plaintiff dan Defendan.

t.t. Hadhariah

Six weeks thereafter, ie, on 27 March 1999, the defendant/respondent filed the application which is the subject matter of this appeal, encl. 31(a), and an affidavit in support. The affidavit in opposition is that as affirmed on 31 March 1999 by the plaintiff's counsel, Encik Brijnandan Singh Bhar.

Encik Brijnandan submitted that by reason of the fact that the defendant was represented by counsel throughout this action, no reliance can be placed on O. 14 r. 5(2) SCR as counsel acting for the defendant is deemed to know when to file the statement of defence. According to him, in the events that had transpired, the defendant should have filed a statement of defence immediately upon the dismissal of the defendant's appeal by the High Court (ie, 18 February 1984); that on the facts of this case time to file defence expired 14 days from the date of dismissal of the defendant's appeal by the High Court, which is either the 2nd or 3rd March 1994.

He was further of the view that the filing of a statement of defence on 8 February 1999, about four years one month after the time to file defence had expired without first obtaining the leave of the court, was in breach of the rules. He further contended that the contents of the application in encl. (32a) was "disrespectful to court", and cannot be considered as an application for extension of time to file defence. He concluded by saying that the Sessions Court Judge had erred in allowing the respondent's application and in accepting the statement of defence which had been filed and urged this court to reject the statement of defence filed, to then allow the appellant's appeal with costs,

- a* and thereafter, to enter interim judgment on liability against the respondent and make a further order that the appellant be allowed to proceed towards assessment of damages.

- b* Encik Khairuddin in his submission in reply candidly admitted that he, as counsel, only realised of the failure to file defence on the trial date of 5 February 1999. Be that as it may he was of the view that the appellant was not entitled to obtain judgment in default of defence for the following reasons. He submitted that the defendant could not and should not be faulted for not filing defence much earlier in the absence of an express court order directing defence to be filed within a specific period of time. It was for this reason
- c* that the application filed by the defendant to regularise the statement of defence which they filed on 8 March 1999 took the form that it did; and this was also the reason why the respondent did not consider it appropriate to apply for an extension of time to file defence. According to En. Khairuddin in the absence of such a court order, there was an uncertainty as to the
- d* commencement date to be taken for the calculation for an extension of time to file defence, and when the time for them to do so, expired. He therefore urged this court to dismiss this appeal and concluded by saying that the justice of the case demands that this case proceed to trial and that it be argued on its merits.

e **Findings**

- I am of the view that the language of the rules in issue are clear and unequivocal. It seems to be inarguable that where a defendant desires to defend the whole or any part of the claim he must file and caused to be served on
- f* the plaintiff his defence before the return date of the summons, unless time has been enlarged by consent or by an order of court and failure to comply with the time fixed for defence either by the rule itself or by consent or by the order of court places the defendant in default of defence.

- g* In applying the rules to the facts of this case my views are these: I hold that the absence of an express order by the court to file defence in this case does not mean that time does not run. As evident from the rules parties can consent to an extension of time to file defence in writing. In this case although there is no express agreement in writing of the plaintiff's counsel consent to extend time, or to suspend the filing of defence until the disposal of the respondent's
- h* striking out application, it could be inferred from the conduct of appellant's counsel that they had so agreed. That this was indeed the position is reiterated when, after the dismissal of the striking out application at the Sessions Court, and the matter was pending appeal before the High Court, the plaintiff's counsel did not object to the application for stay sought by the defendant. The
- i* consent to suspend the filing of defence in my view terminates upon the

conclusion of the defendant's appeal in the High Court. In these circumstances I hold that the appellant's counsel was right in conceding in his submission that the commencement date to compute time to file defence is the date of dismissal of the respondent's appeal by the Penang High Court, ie, 18 February 1994.

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On hindsight, the ideal situation of course would be that, upon dismissal of the respondent's appeal at the High Court, for either party to direct the court's attention to the fact that defence had not been filed at that stage and request the court to make a consequential order directing the defendant to file defence within 14 days or whatever period the court deemed fit. The failure to do so was clearly an oversight.

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Be that as it may I am of the view that the failure to do so, and the absence of an express court order directing defence to be filed, does not mean that the respondent can fold their arms and allow time to pass by without taking the necessary action should they still be desirous of defending the whole or part of the action. I hold that after the unsuccessful appeal, the onus lies on the defendant, if they are still desirous of resisting the suit, to file defence within a reasonable time thereafter, and taking guidance from the time frame prescribed by the rules, 14 days is to be considered reasonable time. In these circumstances I am in agreement with the submission of the appellant's counsel that, in the absence of a specific court order as to the time frame to file defence, the respondent should have filed defence within 14 days from the dismissal of the striking out appeal, and that the time to file defence in this case terminated on 3 March 1994. Computing time from the disposal of the respondent's appeal (18 February 1994), the statement of defence filed on 8 February 1999 was clearly more than four years out of time.

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Further, it is common ground on the facts of this case defence was only filed after the plaintiff counsel had given notice of his intention to enter judgment in default of pleadings without obtaining the prior leave of the court. I am in agreement with Encik Brijnandan's submission that it is incumbent upon the defendant to obtain an extension of time before the defendant can file defence, and that by reason of the failure to obtain such leave, the statement of defence filed by the respondent was irregular and should have been rejected by the Sessions Court.

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Lastly, even if the application before the court is to be considered as an application to extend time from 3 March 1994 to 8 February 1999, ie, four years 11 months and five days to file defence, the question is whether the material before the court constitutes good reason warranting the exercise of court's discretion. Based on the material before the court as enumerated above, I hold that omission due to oversight on the part of respondent counsel cannot

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a be accepted as sufficient cause warranting the exercise of the court's discretion. To hold otherwise, would mean that a party in breach would have an unqualified right to an extension of time and this would defeat the purpose of the rules which is to provide a time table for litigation.

b The respondent's counsel, had in his submission before the court, highlighted the fact that this was but a simple running down case. In this situation I see no real difficulty about preparing a statement of defence. It is observed that the statement of defence which the respondent's counsel eventually filed consists of six short paragraphs with the usual particulars of alleged contributory negligence. To sum up, I hold that the delay that had occurred

c cannot and should not be condoned and the Sessions Court Judge had not exercised her discretion properly in allowing the application and in accepting the defence filed.

d The appellant's appeal is accordingly allowed with costs. The Sessions Court Judge's decision dated 26 April 1999 is hereby set aside and the defendant is precluded from defending this claim. It is further ordered that interlocutory judgment on liability be entered against the defendant with damages to be assessed.

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